

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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GREGORY BARNES,

Plaintiff,

-against-

DR. AMY MALAVI, *et al.*,

Defendants.

ORDER
16-CV-1047 (JFB)(ARL)

FILED

IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

-----X FEB 25 2019 ★

JOSEPH F. BIANCO, District Judge:

LONG ISLAND OFFICE

On February 6, 2019, Magistrate Judge Lindsay issued a Report and Recommendation (the "R&R," ECF No. 65) recommending that the Court deny the motion for summary judgment filed by defendant Dr. Amy Malave ("Dr. Malave"), incorrectly sued as Dr. Amy Malavi (ECF No. 59). The R&R was served on plaintiff via Certified Mail. (ECF No. 65.) The R&R instructed that any objections to the R&R be submitted within fourteen (14) days of service of the R&R, *i.e.*, by February 20, 2019. (R&R 2.) The date for filing any objections has thus expired, and defendant has not filed any objection to the R&R. For the reasons set forth below, the Court adopts the R&R in its entirety and denies defendant's motion for summary judgment with leave to re-file and re-serve plaintiff at his current address. The Court notes that defendant has already filed a renewed motion for summary judgment (ECF No. 66) and served it on plaintiff (ECF No. 66-17) in compliance with Magistrate Judge Lindsay's recommendation.

Where there are no objections to a report and recommendation issued by a magistrate judge, the Court may adopt the report and recommendation without *de novo* review. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985) ("It does not appear that Congress intended to require district

court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings."); *see also Mario v. P & C Food Mkts., Inc.*, 313 F.3d 758, 766 (2d Cir. 2002) ("Where parties receive clear notice of the consequences, failure timely to object to a magistrate's report and recommendation operates as a waiver of further judicial review of the magistrate's decision."); *cf.* 28 U.S.C. § 636(b)(1)(c) and Fed. R. Civ. P. 72(b)(3) (requiring *de novo* review after objections). However, because the failure to file timely objections is not jurisdictional, a district judge may still excuse the failure to object in a timely manner and exercise its discretion to decide the case on the merits to, for example, prevent plain error. *See Cephas v. Nash*, 328 F.3d 98, 107 (2d Cir. 2003) ("[B]ecause the waiver rule is non jurisdictional, we 'may excuse the default in the interests of justice.'" (quoting *Thomas*, 474 U.S. at 155)).

Although parties have waived any objection to the R&R and thus *de novo* review is not required, the Court has conducted a *de novo* review of the R&R in an abundance of caution. Having reviewed the R&R *de novo*, the Court adopts the R&R in its entirety. Accordingly,

IT IS HEREBY ORDERED that the motion for summary judgment (ECF No. 59) is denied with leave to re-file and re-serve plaintiff at his current address. As noted above, the motion has already been re-filed and re-served. *Pro se* plaintiff is instructed to file his opposition to defendant's re-filed motion (ECF No. 66) on or before March 25, 2019. Defendant shall file her reply on or before April 8, 2019. IT IS FURTHER ORDERED that defendant serve a copy of this Order on plaintiff.

~~S~~ORDERED.

/s/ Joseph F. Bianco

JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

Dated: February 25, 2019
Central Islip, NY